2011

Samuel R. McLaughlin v. Greg Schenk : Brief of Appellant

Utah Court of Appeals

IN THE UTAH SUPREME COURT

SAMUEL R. McLAUGHLIN, Plaintiff and Appellant, v. GREG SCHENK; ESTATE OF BOYD SCHENK; ANNA SCHENK; COOKIETREE; INC., a Utah Corporation; HAROLD ROSEMANN, GAYLE SCHENK and JOHN DOES 1-10, Defendants and Appellees.	**BRIEF OF APPELLANT** Case No. 20111109

On Appeal from the Third District Court
Honorable Anthony Quinn

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TABLE OF CONTENTS

TABLE OF CONTENTS (continued)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (continued)

STATEMENT OF JURISDICTION

This Court has appellate jurisdiction over final orders of the Third District Court under Utah Code Ann. § 78B-3-103(3).

STATEMENT OF ISSUES

ISSUE #1: Did Judge Quinn misinterpret the remand directive contained in *McLaughlin v. Schenk*, 2009 UT 64, ¶ 38 when he granted the Defendants' Motion for Summary Judgment Regarding Fairness of the 2005 Waivers? Was the Appellant Sam McLaughlin entitled to a fairness hearing under that directive, or did Judge Quinn and Cookietree have discretion to proceed under Utah Code Ann. § 16-10a-852 and 853?

Standard of review with authority: The mandate of an appellate court binds the district court and the parties and affords the district court no discretion whether to comply with that mandate. *Utah Dep't of Transportation v. Ivers,* 2009 UT 56, ¶8, 208 P.3d 583; *IHC Health Servs., Inc. v. D & K Mgmt., Inc.,* 2008 UT 73, ¶ 28, 196 P.3d 588. Consequently, because the mandate is a legal determination, reviewing whether a district court complied with the mandate presents a question of law, which is reviewed for correctness. *See Amax Magnesium Corp. v. State Tax Comm'n,* 874 P.2d 840, 842 (Utah 1994); *Slattery v. Covey & Co.,* 909 P.2d 925, 927 (Utah Ct.App. 1995).

Preserved in the Record Below: R2135-2137, R2996-2998, R3485-3487.

ISSUE #2: Was Judge Hilder's 10/26/10 Ruling and Order (granting Plaintiff's 01/14/10 Motion for Partial Summary Judgment and/or Declaratory Judgment and denying Defendants' 2/22/10 Cross-Motion for Summary Judgment, and holding Plaintiff

was entitled to a fairness hearing) the law of the case, and was it thus improperly reconsidered by Judge Quinn?

Standard of review with authority: "[T]he application of the law of the case doctrine . . . is ordinarily reviewed under an abuse of discretion standard." *In re Adoption of A.F.K.,* 2009 UT App. 198, ¶ 15, 216 P.3d 980; *In re E.H.,* 2006 UT 36, ¶ 32, 137 P.3d 809. However, "[w]hen a legal question is presented to an appellate court in law-of-the-case packaging," *id.,* the abuse of discretion standard must yield to the correctness standard of review. *See id.* ¶ 33 ("We can identify no reason why an erroneous legal determination should be afforded greater discretion on appeal merely because it wears the garb of law of the case. For purposes of review, then, considerations of law of the case must yield to those of the substance of the underlying ruling when ascertaining the proper standard of review."). *A.F.K.*, 2009 UT App. 198, ¶ 15.

Preserved in the Record Below: R3017-3018.

ISSUE #3: The *McLaughlin* opinion held that shareholders in closely held corporations owe the other shareholders fiduciary obligations, which is a strict good faith standard of utmost good faith and loyalty. *McLaughlin v. Schenk*, 2009 UT 64, ¶ 18, 23. Did the post-remand corporate action, designed to deprive McLaughlin of a hard-won right to a fairness hearing, violate this strict good faith standard?

Standard of review with authority: When "reviewing a district court's grant of summary judgment, the facts and all reasonable inferences are reviewed in the light most favorable to the nonmoving party, here Appellant McLaughlin." *Id.* ¶ 14. Underlying determinations, legal questions, such as the scope of a shareholder's fiduciary duty and

the validity of share transfers under the shareholder agreement, are reviewed for correctness. *Id.*

Preserved in the Record Below: R1825, R3003-3004, R3502, p. 9-10, R3503, p. 13-14, 22.

ISSUE #4: The district court found that the Board and shareholder post-remand waivers complied with the framework for resolving nontransaction related conflict situations and completely resolved Greg Schenk's conflict of interest vis-à-vis the 2005 Waivers. Was this a proper ruling as a matter of law when: (a) Greg Schenk again participated; (b) there was not a qualified Board; and (c) there were disputes of material fact relating to the adequacy of the disclosures, information made available and knowledge held by the allegedly disinterested Board member prior to those corporate actions?

Standard of review with authority: *See* Standard of Review for Issue #3, above.

Preserved in the Record Below: R1823-1825, R2137-2144, R2962-2963, R2978-2982, R3011-3014, R3487.

CONSTITUTIONAL PROVISIONS AND STATUTES

Not applicable.

STATEMENT OF THE CASE

Nature of the Case.

Within weeks of this Court's decision in *McLaughlin v. Schenk*, 2009 UT 64; 220 P.3d 146 (herein "the Opinion" or *McLaughlin I*), Cookietree, Inc. and Schenk embarked upon a course of conduct designed to thwart the specific language of ¶ 38 of the Opinion

and avoid, at all costs, the fairness hearing dictated by this Court. McLaughlin and Judge Hilder read the remand directive and found in it a clear mandate. Cookietree / Schenk and Judge Quinn read the remand directive as allowing alternative courses of action. As demonstrated herein, the remand directive specifically required a fairness hearing, because any shareholder vote must (and did) include Greg Schenk. Since he is the majority shareholder, President of the Board, and has heightened duties to McLaughlin whether he wears his "shareholder hat" or his "director hat" the *only* way to resolve the fairness of the 2005 Waivers is through judicial action under Utah Code Ann. § 16-10a-851. *McLaughlin I,* ¶ 38.

Course of Proceedings.

1. *McLaughlin I* was decided on October 2, 2009. R1758 Paragraph 38 of the Opinion contained a remand directive: "We therefore remand for a determination of whether the [2005] waivers were fair within the meaning of Utah Code section 16-10a-851, which is a fact-intensive inquiry focusing on whether the waivers were beneficial to the corporation and the shareholders and whether they satisfied the standard of fair dealing." (hereinafter "remand directive").

2. Remittur was accomplished on November 10, 2009. R1779.

3. On December 18, 2009, a Board meeting was held. R1829.

4. On January 6, 2010, a Shareholder meeting was held. R1835.

5. On the basis of actions and resolutions at those two meetings, McLaughlin immediately filed a Motion for Partial Summary and/or Declaratory Judgment Declaring the Invalidity of Corporate Actions. R1876. The Motion was brought under Utah Code

Ann. § 16-10a-824(3), the company's bylaws, Utah Code Ann. § 78B-6-401 and Utah R. Civ. P. 56(a). R1877.

6. The Motion argued, among other things, that the corporate actions taken on December 18, 2009 and January 6, 2010 were improperly undertaken for the specific purpose of circumventing the remand directive. R1824.

7. In response Cookietree and Greg Schenk, collectively, filed a Cross Motion for Summary Judgment. R1882. Cookietree and Schenk argued that the Opinion "remanded for further action to resolve the conflict of interest" (R1884) and asked Judge Hilder to recognize the December 12, 2009 and January 6, 2010 corporate actions as valid and effective to (again) waive the 1991 and 1999 stock transfer provisions and ratify the 2005 Waivers. R1887-1921.

8. Judge Hilder, noting "the Supreme Court's remand appears to be unequivocal" (R2372) and citing *Gildea v. Guardian Title Co.,* 2001 UT 75; ¶ 19; 31 P.3d 543 and *IHC Health Services, Inc. v. D&K Management, Inc.,* 2008 UT 73, ¶ 28; 196 P.3d 588 ruled that "in this case the parties and the courts are bound by the mandate on remand." R2374. Judge Hilder denied Cookietree and Schenk's Cross-Motion for Summary Judgment and granted McLaughlin's Motion for Partial Summary Judgment, ruling that McLaughlin "is entitled to the fairness hearing identified by the Supreme Court." R2374.

9. Cookietree and Schenk petitioned the Utah Supreme Court to appeal interlocutorily from Judge Hilder's ruling. R2377. That Petition was denied. R2383.

10. At a subsequent Rule 16 Conference set for the purpose of scheduling a trial and obtaining clarification on procedure for a fairness hearing, Judge Hilder announced to the parties that he was retiring and that the case would be reassigned to Judge Quinn. R3501, p. 2-3, 10.

11. Judge Quinn soon held a status conference with the parties on May 17, 2011. Judge Quinn announced "I'm certainly not going to take the same position that Judge Hilder did. The efforts to remedy what took place in 2005 have no effect on what ultimately happens in this case because I'm not convinced that's the case. I think that the corporation can try and fix it. Whether they've effectively fixed it or not, I don't know, but I think that they can. . . . So why don't we invite [Cookietree and Schenk] to file a motion for summary judgment that addresses all of those issues. . . . Then I think I'd be in a better position to determine if there is any additional hearings necessary." R3502, p. 11.

12. Cookietree and Schenk then filed (another) Motion for Summary Judgment Regarding Fairness of 2005 Waivers. R2705. This Motion again argued that the December 18, 2009 and January 6, 2010 post-remand corporate actions "cured" any defect in the 2005 Waivers. R2707. The Motion also argued that the 2005 Waivers were fair as a matter of law, based upon allegedly undisputed facts. R2707.

13. McLaughlin defended by arguing that "fairness" by its nature is a fact-intensive inquiry (R2989 and Opinion, ¶ 38) and demonstrating the existence of questions of material fact pertaining to fairness. R2950-2989. McLaughlin also made the following arguments to Judge Quinn:

a. Judge Hilder's denial of the Cross-Motion for Summary Judgment (paragraph 8 above) and refusal to recognize the post-remand corporate action was law of the case. R3017. Considerable time and expense went into briefing and defending against the December 18, 2009 and January 6, 2010 corporate action the first time. R3017. McLaughlin asked Judge Quinn, given the absence of manifest injustice, change of controlling authority or new evidence, to decline to reconsider Judge Hilder's ruling. R3017-3018.

b. The mandate rule binds Judge Quinn and the parties. R2991, R3503, p. 6, 13-14. Not only are the district court and the parties bound by the remand directive (Opinion ¶ 38) but they are bound by other pronouncements in the Opinion:

> "At the time th[e 1999 Stock Transfer] was made, it violated the 1991 Shareholder Agreement. *McLaughlin I*, ¶ 6.
>
> "[C]lose corporation shareholders [owe] all the same duties owed by partners – utmost good faith and loyalty to all shareholders of the corporation. Compared to the fiduciary duty owed by directors and stockholders of public corporations . . . this duty [is] 'more rigorous' than the 'somewhat less stringent' corporate duty of good faith and inherent fairness." *Id.* at 18 (and expressly adopted in ¶ 22).
>
> "[S]tockholders in close corporations must discharge their management and stockholder responsibilities in conformity with this strict good faith standard. They may not act out of avarice, expediency or self-interest in derogation of their duty of loyalty to the other stockholders and to the corporation." *Id.*
>
> With this holding, the Utah Supreme Court recognized "alternative remedies [] for oppressed shareholders" including equitable remedies and relief. *Id.* at ¶ 22 and fn. 4.
>
> "The transfer of shares from Anna Schenk to Greg Schenk did not conform to the first right of refusal provision; therefore it was void unless the

waivers by the Board and three of Cookietree's shareholders were valid. *Id.* at ¶ 31.

"[T]he [2005] waivers ratifying the 1999 share transfer were tainted by a conflict of interest because they were both executed by Greg Schenk, who clearly had an economic interest in waiving the share transfer restrictions of the shareholder agreement that were ignored when he received the shares by which he gained majority control of Cookietree." *Id.* at ¶ 38.

"By waiving the restrictions on the share transfers, Schenk and the other board members and voting shareholders deprived the company and the nonvoting shareholders of the economic opportunity to increase their investment in the corporation. *Id.*

We therefore remand for a determination of whether the waivers were fair within the meaning of Utah Code section 16-10a-851, which is a fact intensive inquiry focusing on whether the waivers were beneficial to the corporation and the shareholders and whether they satisfied the standard of fair dealing. " *Id.*

R2992-2993.

c. The post-remand corporate action did not cure anything. The new waivers and ratifications were tainted by the same problem as the 2005 Waivers: the participation of Greg Schenk. R3011-3014, R3503, p. 6 lines 9-11.

14. Judge Quinn ruled from the bench at oral argument. While he properly found that "fairness" of the 2005 Waivers was a question of fact for which summary judgment was not appropriate (R3503, p. 4 lines 7-12) he went on to rule that the post-remand corporate action "completely resolve[d] any issue concerning the conflict of interest that was found to have tainted the original waivers." R3503, p. 4 line 23 – p. 5 line 11. Specifically, Judge Quinn reasoned:

a. The Opinion "set aside or reserved the issue or remanded the issue of the 2005 [Waivers] because they were tainted by a conflict of interest, and in doing so

the Supreme Court advised as its template the conflict of interest approach for conflict of interest transactions that's in 16-10A-851 should be the template for resolving this." R3503, p. 3 lines 2-7.

b. "They also explicitly remanded for a fairness issue . . ." R3503, p. 3 line 8.

c. "The question can be fairly raised in light of the fact that that remand instruction was explicit. Do I have any discretion at all to consider the other two possibilities that are set forth in the statute, one of which is director's action by qualified directors, the other which – other of which is shareholder's action. I think that I do." R3503, p. 3 lines 14-19.

d. "I don't think that in making [the remand directive] the Supreme Court intended to foreclose the possibility that the transaction could be addressed under the other two subsections [of 16-10a-851]." R3503, p. 4 lines 2-5.

e. "I know Judge Hilder thought differently about that, but that's what I think." R3503, p. 4 lines 5-6.

Disposition in Court Below.

Judge Quinn revisited the 10/26/10 order of Judge Hilder applying the mandate rule, interpreted the remand directive as giving him and Cookietree/Schenk "discretion" (R3503, p. 3 line 16) and ruled that the post-remand waivers and ratification were effective as a matter of law to "cure" the violations of the 1991 and 1999 shareholders agreement whereby Greg Schenk personally obtained 545,200 additional shares of Cookietree stock to the detriment of Sam McLaughlin. A copy of the written 11/17/11

Ruling and Order prepared by Cookietree/Schenk and signed by Judge Quinn is attached as Addendum "A." R3480-3488.

Statement of Relevant Facts.

The Disputed Stock Transfer and *McLaughlin I*

1. Greg Schenk is the majority shareholder and President of the Board of Cookietree, Inc. Sam McLaughlin is a minority shareholder and former executive employee of Cookietree, Inc. R1818.

2. In 2004 Sam McLaughlin sued Greg Schenk for breach of a Shareholders Agreement which governed the sale and transfer of stock in Cookietree, Inc. The transfer at issue was the sale of 545,200 shares of stock to Greg Schenk from his father's widow, Anna Schenk, in 1998 ("the disputed stock transfer"). R1-25.

3. McLaughlin alleged that the disputed stock transfer violated the Shareholders Agreement's express provisions. R8-10. The transfer gave Greg Schenk majority control of Cookietree, Inc. *McLaughlin I,* ¶ 38. Had Greg Schenk followed the Shareholder's Agreement, McLaughlin would have been given the opportunity to purchase a portion of the 545,200 shares.

4. In 2005 Cookietree's Board, including Greg Schenk and his wife, and three shareholders including Greg Schenk, voted to waive the provisions of the applicable Shareholders Agreement that precluded the stock transfer ("the 2005 Waivers"). R227-228, R3481. Also, certain of Cookietree, Inc.'s shareholders, including Greg Schenk, voted to waive the stock transfer provisions. R230-235, R3481-3482.

5. The district court granted summary judgment on the 2005 Waivers (R1735), McLaughlin appealed to the Utah Supreme Court (R1739) and *McLaughlin I* was issued.

6. *McLaughlin I* held the 2005 Waivers, through Greg Schenk's participation, were tainted with conflict of interest. *McLaughlin I,* ¶ 38. "We therefore remand for a determination of whether the [2005 W]aivers were fair within the meaning of Utah Code Ann. § 16-10a-851, which is a fact-intensive inquiry focusing on whether the waivers were beneficial to the corporation and the shareholders and whether they satisfied the standard of fair dealing." *Id.*

Post Remand Corporate Action

7. Within weeks of the Opinion, on December 18, 2009, and at the request of Greg Schenk, the Board met. R1829-1833. All three (3) Board members were present, constituting a quorum. *Id.* Greg Schenk is still a member of the Board.

8. Unlike in 2005, Schenk and Rosemann disqualified themselves for conflict of interest. *Id.* The remaining "disinterested" Board member, David Rudd, alone voted to ratify the 2005 Board waiver and "presently waived the stock transfer provisions in the Shareholders Agreement." R3484. All three Board members then voted to ratify these actions of Rudd. *Id.* Rudd also authorized the same actions, in the form of Proposal 1 (present waiver of the stock transfer provisions) and Proposal 2 (ratification of 2005 Waivers and Proposal 1) to be submitted to the shareholders for vote at the upcoming annual meeting on January 6, 2010. *Id.*

9. At the shareholder meeting, all shareholders appeared by voting proxy, with the exception of Greg Schenk and Harold Rosemann who were present personally. At the meeting, a majority of shareholders (including Greg Schenk and Harold Rosemann) voted for Proposal 1. R3485, ¶ 15. A majority of shareholders (not including Greg Schenk but including Harold Rosemann) voted for Proposal 2. *Id.* at ¶ 9.

SUMMARY OF ARGUMENTS

The remand directive in this case was specific and unambiguous. *McLaughlin I* found that the Shareholders Agreements did not anticipate the situation presented by the disputed stock transfer. Therefore, it remanded for a determination of whether the 2005 Waivers were fair within the meaning of Section 851. Judge Quinn misinterpreted the remand directive and violated the mandate rule when he found he had discretion to allow other ways to "fix it."

McLaughlin successfully convinced Judge Hilder of this and a fairness hearing in accord with the remand directive was ordered on October 26, 2010. This order, after briefing, discovery and argument, became law of the case. Judge Quinn should not, upon inheriting the case in this posture, have invited and granted a new motion on the same basis.

Cookietree and Schenk's post-remand action in immediately conceiving, procuring and seeking to enforce new ratifications and waivers, which all included the participation of Greg Schenk, violated the duty of utmost good faith and fair dealing this Court imposed upon shareholders in close corporations by its holding in *McLaughlin I.* Judge

Quinn erred when he found the situation had been "cured" and that there were no material issues of fact surrounding the new corporate action.

Lastly, it was inappropriate to grant summary judgment on the basis of the post-remand corporate action. The same taint, Greg Schenk, infects the post-remand action. There are material issues of fact surrounding the adequacy of the disclosures made to the "sole disinterested director" and to the shareholder group. The Board action was ineffective because it was not the action of a majority of the directors present.

ARGUMENT

I. THE MANDATE RULE REQUIRED UNWAVERING FIDELITY TO THE REMAND DIRECTIVE IN ¶ 38.

McLaughlin I remanded a three-part question: (1) Were the 2005 Waivers fair within the meaning of Section 851? *Id.* (2) Were the [2005 W]aivers beneficial to the corporation and its shareholders? *Id.* (3) Did the [2005 W]aivers satisfy the standard of fair dealing? *Id.* *McLaughlin I* called the remand directive a "fact-intensive inquiry." *Id.* Cookietree and Schenk sought to avoid the remand directive when they contrived, procured and sought to enforce the new, post-remand corporate action. Judge Quinn thereafter departed from the remand directive when he refused to hold a fairness hearing, instead granting summary judgment on the basis of that action. This Court should not tolerate the intentional thwarting and frustration of its express directive and should reverse the 11/17/11 Order.

The mandate rule dictates that pronouncements of an appellate court on legal issues in a case become the law of the case and must be followed in subsequent

proceedings of that case. "The mandate rule binds both the district court and the parties to honor the mandate of the appellate court." *Utah Dep't of Transportation v. Ivers*, 2009 UT 56, ¶ 12, 218 P.3d 583. "The lower court must implement both the letter and the spirit of the mandate, taking into account the appellate court's opinion and the circumstances it embraces." *Id.* In proceedings on remand, an "unwavering fidelity to the letter and spirit of the mandate" is required. *Campbell v. State Farm Mut. Auto. Ins. Co.,* 2004 UT 34, ¶ 5, 98 P.3d 409.

Error occurred when the district court found that the remand directive instructs "the trial court and not . . . the parties." *See* 10/18/11 Tr. p. 3 lines 23-24. Error further occurred when the district court decided he had "discretion" to consider the other two possibilities that are set forth in" Sections 852 and 853. R3503, p. 3 lines 14-19.

Ivers held that both the letter and the spirit of an appellate court's opinion must be observed, along with "the circumstances it embraces." The Opinion found that McLaughlin had been damaged and unequivocally recognized the appropriateness of equitable relief to address those damages if the 2005 Waivers were not fair. *Id.* ¶ 38 and fn 4. McLaughlin was denied his opportunity to have a fairness hearing and to prove damages.

II. JUDGE HILDER'S 10/18/10 RULING AND ORDER WAS LAW OF THE CASE; JUDGE QUINN SHOULD NOT HAVE REOPENED THE ISSUE.

McLaughlin initially defeated Cookietree's attempt at summary judgment following a nine-month-long effort at briefing, discovery and cross-briefing. R1815-2371. Litigation procedures are enormously expensive for individuals. After oral

argument, Judge Hilder (correctly) interpreted the remand directive and declined to enforce the post-remand corporate action.

Sua sponte, when Judge Quinn inherited the case, he indicated that he thought Cookietree and Schenk could "fix it" and invited another dispositive motion. McLaughlin respectfully asked Judge Quinn not to reconsider the 10/18/10 Ruling and Order under the "law of the case" doctrine. R3017-3018. When a legal "decision [is] made on an issue during one stage of the case," that decision "is binding in successive stages of the same litigation." Particularly when an appellate court makes a pronouncement on a legal issue, "[t]he lower court must not depart from the mandate . . . ." This is true even if the lower court "believe[s] that the issue could have been better decided in another fashion." *Jensen v. IHC Hosps., Inc.*, 2003 UT 51, ¶ 67, 82 P.3d 1076 (alterations in original) (quoting *Thurston v. Box Elder County*, 892 P.2d 1034, 1037-38 (Utah 1995).

Further, there were no exceptions to the law of the case doctrine to justify the exercise of discretion by Judge Quinn. Under *IHC Health Services, Inc. v. D&K Management, Inc.*, 2008 UT 73, 196 P.3d 588, ¶ 34 three exceptional circumstances could justify departure from the law of the case doctrine: "(1) when there has been an intervening change of controlling authority; (2) when new evidence has become available; or (3) when the court is convinced that its prior decision was clearly erroneous and would work a manifest injustice." The Court did not find, nor did Cookietree or Schenk even argue, the presence of any three of these exceptions. R3341-3342.

III. THE POST-REMAND CORPORATE ACTION VIOLATED THE DUTY OF GOOD FAITH AND FAIR DEALING ENUNCIATED AND IMPOSED IN *MCLAUGHLIN I.*

Cookietree and Schenk were and are bound by the holdings of *McLaughlin I.* "At the time th[e 1999 Stock Transfer] was made, it violated the 1991 Shareholder Agreement. *McLaughlin I*, ¶ 6. "[C]lose corporation shareholders [owe] all the same duties owed by partners – utmost good faith and loyalty to all shareholders of the corporation. Compared to the fiduciary duty owed by directors and stockholders of public corporations . . . this duty [is] 'more rigorous' than the 'somewhat less stringent' corporate duty of good faith and inherent fairness." *Id.* at 18 (and expressly adopted in ¶ 22). "[S]tockholders in close corporations must discharge their management and stockholder responsibilities in conformity with this strict good faith standard. They may not act out of avarice, expediency or self-interest in derogation of their duty of loyalty to the other stockholders and to the corporation." *Id.* (emphasis added). With this holding, the Utah Supreme Court recognized "alternative remedies [] for oppressed shareholders" including equitable remedies and relief. *Id.* at ¶ 22 and fn. 4.

"The transfer of shares from Anna Schenk to Greg Schenk did not conform to the first right of refusal provision; therefore it was void unless the [2005] waivers by the Board and three of Cookietree's shareholders were valid. *Id.* at ¶ 31. "The waivers ratifying the 1999 share transfer were tainted by a conflict of interest because they were both executed by Greg Schenk, who clearly had an economic interest in waiving the share transfer restrictions of the shareholder agreement that were ignored when he received the shares by which he gained majority control of Cookietree." *Id.* at ¶ 38.

"By waiving the restrictions on the share transfers, Schenk and the other board members and voting shareholders deprived the company and the nonvoting shareholders of the economic opportunity to increase their investment in the corporation. *Id.* Cookietree's Shareholder's Agreement did not anticipate or foresee a situation such as this. "We therefore remand for a determination of whether the waivers were fair within the meaning of Utah Code section 16-10a-851, which is a fact intensive inquiry focusing on whether the waivers were beneficial to the corporation and the shareholders and whether they satisfied the standard of fair dealing. " *Id.*

The "letter and spirit" of the Opinion must be taken as a whole; Cookietree's/ Schenk's counsel only read the first sentence of ¶ 37 when they devised the post-remand corporate action. Therefore, in the fifth year of this litigation, Schenk, his lawyers and the company he controls, Cookietree, Inc., embarked upon a course of conduct designed to deprive Sam McLaughlin of the fairness hearing directed by this Court.[1] The efforts to deprive their fellow shareholder of an appellate mandate were in bad faith and of themselves constitute a violation of the duty of good faith and fair dealing articulated in the *McLaughlin I* holding.

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[1] Usually a minority shareholder would be economically barred from continually fighting such tactics as these. McLaughlin is fighting a goliath. Cookietree has not only aided and promoted Schenk's cause, but they have paid his attorneys' fees and costs as well. R3001. Here, McLaughlin believes so strongly in his evidence he has fought for eight years and two appeals for the opportunity to present the facts and circumstances of the disputed stock transfer to a fact finder. This Court should honor and allow that opportunity.

Within weeks of remand, Cookietree's/Schenk's counsel prepared a "disclosure document" which describ[ed] the facts and circumstances surrounding the 2005 Board Waiver and the issues associated with authorizing a new waiver," which was disseminated to and reviewed by the three members of the Board. R1830. Privilege was asserted for this document, which was not produced in discovery and does not appear in the record below. R2216-2217.

A set of Minutes, prepared by Cookietree's/Schenk's counsel, reveals a veritable shell game of Board action, all discussed and conducted in 10 minutes time. R2978-2979.[2] Three Board members were present and two disqualified themselves to avoid the appearance of a conflict. R2978.[3] The three Board members "determined to put the matter[s]" of ratification and waiver before the "sole disinterested director." R1830. That director, acting alone, then ratified the 2005 Board Waivers and presently waived the stock transfer provisions for the disputed stock sale. R1830. The two disqualified Board members then ratified that. R1830-1831. The Board then resolved to put a convoluted Proposal 1 and Proposal 2 to a vote by Shareholders. *Id.* Those shareholders, which included the disqualified directors, then undertook a similar shell game of ratification of past waivers, present waivers, ratification of ratification and present waivers. R1985.

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[2] The record has been mis-paginated here. There are two R2978 and R2979. This citation intends to refer to p. 29-30 of the document at issue.

[3] This refers to p. 31.

McLaughlin argued below that this conduct, designed for the sole purpose of preventing McLaughlin from getting his fairness hearing, was a violation of the duty of utmost good faith and fair dealing imposed by *McLaughlin I.* The Court concluded that "*there is no material question of fact concerning the circumstances surrounding the [post-remand corporate action]* or the content of disclosures made to David Rudd and the shareholders in connection therewith." R3487. It was error, in light of all the facts and circumstances, to conclude that as a matter of law the duty was not violated in the procurement of the post-remand corporate action.

IV. THE POST-REMAND WAIVERS WERE NOT VALID AND EFFECTIVE AS A MATTER OF LAW AND IT WAS ERROR TO RULE THEY WERE.

Almost immediately after the issuance of the Opinion in October 2009, at the request of Greg Schenk and with the assistance of litigation counsel, Cookietree initiated action under Utah Code Ann. §16-10a-852 and 853. They prepared and then executed a ratification of the 2005 Waivers and prepared new, present waivers of the disputed stock transaction. For this strategy, Cookietree ignored the remand directive and focused only on the first sentence of ¶ 37 of the Opinion. Paragraph 38 of the Opinion, however, remanded for a fact intensive fairness hearing under Utah Code Ann. § 16-10a-851. If the fairness inquiry into the 2005 Waivers (in which Greg Schenk participated) is "fact-intensive" (*McLaughlin I,* ¶ 38) should not also the fairness of the post-remand waivers (in which Greg Schenk participated) qualify as a question of fact? R3503. Judge Quinn erred when he found the post-remand actions valid and effective as a matter of law.

A. Rule 24(a)(9) Statement.

Pursuant to Utah R. App. P. 24(a)(9) McLaughlin here identifies challenged findings of fact and marshals the record evidence supporting the finding.

> **"Prior to the meeting, David Rudd analyzed and reviewed documentation containing all of the material facts concerning the Stock Sale and the 2005 Waivers."** R3483, ¶ 10.

Evidence supporting the finding: David Rudd discussed the proposed Board action with litigation counsel. R2979[4], R3337. He reviewed the 2005 Waivers; he reviewed the Shareholders' Agreements; he discussed the proposed Board action with the other members of the Board; he reviewed the Disclosure Statement; and he reviewed McLaughlin *I.* R2761. Mr. Rudd reviewed financial information. R3337. Mr. Rudd testified that he considered factors, namely the Opinion and the disclosure statement, that indicated the 2005 Waivers may not be fair. *Id.* At the post-remand meeting, the Board discussed the 1999 stock sale, the 2005 Waivers and the Supreme Court's holding in *McLaughlin I* that the 2005 Waivers were tainted because Greg Schenk had a conflict of interest. R2733, ¶ 48.

Evidence to challenge the finding: Mr. Rudd did not know and still does not know material pieces of information which would allow him to evaluate the circumstances and fairness of the disputed stock transfer. R2978[5]-2982. For example, he

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[4] p. 30.

[5] p. 31-35.

does not know what consideration was paid for the disputed shares in 1999 or whether the provisions in the Shareholders Agreement setting forth how shares were to be valued were followed in 1999. R2978.[6] He does not know how many shares Sam and Kim McLaughlin (and by extension, other shareholders) would have been able to acquire in 1999, had they been given the opportunity or the value of those shares in 2010 compared to 1999. *Id.*

David Rudd only knows one perspective (the one controlled by Greg Schenk and his lawyers). R2978[7]-2979. He has never talked to Anna Schenk, the seller of 545,200 shares. He has never talked to Sam McLaughlin, the shareholder who challenged the transaction. *Id.* He has never talked to Greg Schenk, the buyer, about the transaction. *Id.* He did, however, talk to litigation counsel and reviewed a (privileged) briefing/ disclosure document prepared by them prior to his vote. *Id.*

Significantly, Mr. Rudd held, and still holds, certain material and mistaken beliefs of fact. R2979[8]-2980. He incorrectly believes that, in 1999, Anna Schenk offered the 545,200 shares first to Cookietree and that Cookietree's Board and shareholders went through a process of evaluating the respective rights of the company, and the shareholder had obtained waivers, both on a board level and a shareholder's level, to the stock

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[6] p. 31.

[7] p. 31-32.

[8] p. 32-33.

transfer provisions and Mr. Schenk purchased the shares. In other words, Mr. Rudd believes the Shareholder Agreement was followed *in 1999*. R2980.

Mr. Rudd believes the disputed stock transfer was fair to the shareholders in 1999 because it is fair now, in 2010. R2980. However, one of the factors Mr. Rudd believes bears on fairness is the "contribution of people who run the business, who make the business successful, who add certain benefits to the business." *Id.* Even so, Mr. Rudd does not have any understanding as to whether McLaughlin was such an employee in 1999 (or in 2005 for that matter). *Id.* In fact, McLaughlin materially helped build Cookietree into the successful business it is today. *Id.*

When confronted (apparently for the first time) with the true facts surrounding the 1999 stock transfer (i.e. that it was accomplished without the knowledge of the other shareholders and without being recorded in the company's stock transfer ledger or in contemporaneous Board minutes), Mr. Rudd stated that notice should have been given to all shareholders for the transfer to be fair and proper. R2980. However, this was never done.

Mr. Rudd believes that parties to a contract, like a shareholder's agreement, have the right to expect that the contract's provisions are followed. R2981. Yet he voted to waive the stock transfer provisions in the Shareholders Agreement.

The Disclosure Statement sent to the shareholders prior to the post-remand meeting fully disclosed all material facts. R3484, ¶ 14.

Evidence supporting the finding: The Disclosure Statement disclosed all material facts concerning the 1991 Shareholders' Agreement, the Transfer Restriction Provisions, the

1999 Stock Sale, the 2005 Waivers, Greg Schenk's conflict of interest and the circumstances surrounding this litigation, and the Supreme Court's *McLaughlin I* decision. R2735.

Evidence to challenge the finding: There was no counter-opinion contained in the Disclosure Statement. R2962. The document was drafted by litigation counsel and therefore subject to a reasonable inference that it was advocacy, not information. *Id.* The Disclosure Statement was single spaced, rambling and confusing to read. *Id.* There is a question of fact about whether the lengthy Information Statement and the Minutes were the *result* of a 10-minute Board meeting or simply rubber-stamped at that meeting. R2962-2963.

The Disclosure Statement did not disclose other facts such as whether Greg Schenk provided consideration for the 2005 Waivers or the post-remand waivers (R2968-2969), whether the waivers were the unilateral acts or the acts of counsel (R2968), whether Harold Rosemann (Board member and shareholder) received consideration for his complicity and facilitation (R2969, R2983-2984) and what the impact was. The Disclosure Statement did not address the issue of good faith or the adequacy of the disclosures made in the procurement of the 2005 Waivers and the numerous facts that could be considered in support of that issue. R2972-2976.

B. The Post-Remand Shareholder Action Cannot be Effective as a Matter of Law.

The immutable problem with the post-remand action, or any waiver of the stock transfer provisions under Cookietree's Shareholder Agreement, was articulated by

McLaughlin I. "The agreement [] provided that written consent from either the board of directors or the owners of at least two-thirds of the shares (excluding the shares owned by the selling shareholder) c[an] waive the agreement's restrictions on share transfers." *McLaughlin I,* ¶ 5, 30. Because of the number of shares he owns, if Greg Schenk is removed from the equation, it is not possible to obtain a two-thirds vote. R2807, R2971. Additionally, Greg Schenk is President of the Board. Accordingly, *McLaughlin I* held "[t]he agreement failed [] to foresee the possible conflicts presented when a buyer is already a corporate shareholder and votes to waive the restrictions on share transfers." ¶ 38.

In justifying Greg Schenk's participation in the post-remand corporate action, Cookietree acknowledged: "Greg Schenk voted on [2010] Proposal 1 because his vote was necessary for waiver under the Shareholders' Agreements, as both Agreements require a two-thirds approval for a waiver not including the share of the seller in the transaction (i.e. the Boyd Schenk Shares)." R1917. Greg Schenk, the person the Utah Supreme Court found tainted the 2005 Waivers with a conflict of interest, was a "necessary" vote for the 2010 Waivers because of the provisions in the Shareholders Agreements.

This statement is *apropos* of the holding in ¶ 38: the Shareholders Agreements require Greg Schenk to vote. He is the self-dealing director/shareholder. This situation is not contemplated by the governing documents. The only way to resolve it is the remand directive: a fairness hearing. Schenk's conflict of interest is res judicata. *McLaughlin I,*

¶ 31, 38. Therefore, no vote of the shareholders could effectively waive the share transfer provisions violated in 1999 during the disputed stock transfer.

Additionally and supplementally, there is a dispute of fact about the adequacy of the disclosures made to shareholders in the form of Information Statement. *See* p. 20-23 above. If there is a question of fact about the adequacy of the information the shareholders had prior to voting, the post-remand action cannot be legal and valid as a matter of law.

C. The Post-Remand Board Action Was Not Valid or Effective as a Matter of Law.

1. The 2009 Board Was Not Qualified.

Cookietree's Bylaws § 3.07 require that a quorum be present. R1849-1873. Section 3.08 (R1856) states that "the act of the majority of the directors present at a meeting at which a quorum is present shall . . . be the act of the Board." This is in accord with Utah Code Ann. § 16-10a-824(3).

Since three (3) Board members were present for a quorum at the 12/18/09 meeting, the 12/18/09 acts, resolutions and recommendations could not have been "the act of the majority of directors present" since only one (1) Board member voted. One of three is not a majority. Therefore, the ratification of the 2005 Waivers made solely by Rudd, the present waiver approved by Rudd, the recommendation to the shareholders in favor of Proposal 1 and Proposal 2 made solely by Rudd, and the submission of Proposal 1 and Proposal 2 to the shareholders solely by Rudd are invalid as a matter of law. The

district court erred when it held otherwise and recognized the post-remand corporate action as effective.

2. Even if the Board was Qualified, Disputes of Fact Regarding the Adequacy and Fairness of Rudd's Information Preclude the Entry of Summary Judgment on the Post-Remand Board Waiver.

When deposed, Mr. Rudd revealed a fundamental lack of understanding about the disputed stock transfer itself, the circumstances of the 2005 Waivers and could not articulate why the 2005 Waivers were fair. A copy of his entire deposition is contained in the record at R2147-2251. Mr. Rudd is a very busy man; he is a practicing lawyer and he sits on other boards for other companies (one other, in fact, with Greg Schenk). Mr. Rudd made no effort to investigate or understand both sides of the disputed stock transfer issue. He simply swallowed what Cookietree's counsel provided to him in the 10 minute discussion at the Board Meeting and signed off on the minutes they prepared. It was improper to find, as a matter of law, and given the record evidence to refute that finding, that Mr. Rudd "analyzed and reviewed all material facts."

CONCLUSION

The parties and the trial court were bound by the Utah Supreme Court's remand directive for a fairness hearing. The procurement and judicial recognition of new waivers violated the letter and spirit of the mandate. Even so, the post-remand waivers are contaminated by the same problem as the 2005 Waivers: the participation of Greg Schenk.

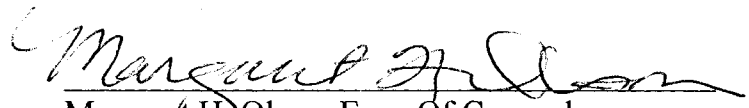
STATEMENT REGARDING ATTACHMENTS

Undersigned counsel hereby certifies that the materials attached hereto as Addendum A are part of the record on remand. Utah R. App P. 24(a)(4).

RULE 24 (f) CERTIFICATE OF COMPLIANCE

This brief complies with the type volume limitation in Utah Rule App. P. 24(f)(1)(C). It has 6748 characters.

DATED this 18th day of June, 2012.



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CERTIFICATE OF DELIVERY

I hereby certify that I caused a true and correct copy of the foregoing Appellant's Brief to be delivered as follows:*

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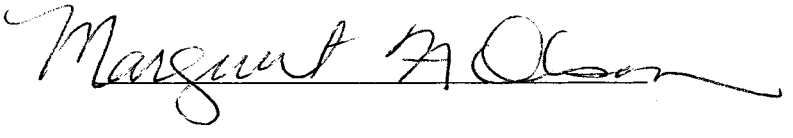

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IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR

SALT LAKE COUNTY, STATE OF UTAH

SAMUEL R. McLAUGHLIN et al.,

Plaintiffs,

v.

GREG SCHENK et al.,

Defendants.

[PROPOSED] RULING AND ORDER

Case Nos.: 040924997, 050906729 (consolidated)

Judge: Anthony Quinn

THIS MATTER came before the Court on Defendants Greg Schenk and Cookietree, Inc.'s ("Cookietree") Motion for Summary Judgment Regarding Fairness of 2005 Waivers (the "Motion"). Defendants Anna Schenk and the Estate of Boyd Schenk (the "Estate") joined in the Motion. The Court has considered the materials submitted in support of and in opposition to the Motion, including the Motion itself and all supporting materials; Anna Schenk and the Estate's joinder; Plaintiff Samuel R. McLaughlin's ("McLaughlin") opposition and supporting materials; Greg Schenk and Cookietree's reply memorandum and supporting materials; and the record and file herein. In addition, the Court heard argument of counsel on October 18, 2011.

BACKGROUND

1. On August 16, 1999, the Estate (administered by Anna Schenk) sold 545,200 shares of Cookietree common stock to Greg Schenk pursuant to a Stock Purchase and Sale Agreement (the "Stock Sale"). (*See* August 19, 1999 Stock Purchase and Sale Agreement, attached to the Affidavit of Harold Rosemann (the "Rosemann Aff.") (Ex. 1 to the Motion) as Ex. 6.)

2. In November 2004, McLaughlin, a minority shareholder and former employee of Cookietree, commenced the instant lawsuit, in which he alleged, among other things, that the Stock Sale was made in violation of a 1991 agreement among Cookietree and certain of its shareholders (the "1991 Shareholders' Agreement") that placed certain restrictions on the sale or transfer of Cookietree common stock (the "Transfer Restriction Provisions"). (*See* Compl., on file herein.)

3. On May 17, 2005, Cookietree's Board of Directors (the "Board") (consisting of Greg Schenk, Cookietree's President; his wife, Gayle Schenk; and Harold Rosemann, Cookietree's Treasurer) adopted a resolution by means of a unanimous written consent of the members of the Board that waived the Transfer Restriction Provisions of the 1991 Shareholders' Agreement to the Stock Sale (the "2005 Board Waiver"). (*See* 2005 Board Waiver, attached to the Rosemann Aff. as Ex. 8.)

4. On the same day, the then owners of more than two-thirds of the shares of the common stock of Cookietree subject to the 1991 Shareholders' Agreement (excluding the shares at issue in the Stock Sale) executed a Waiver and Consent that waived the Transfer Restriction

Provisions of the 1991 Shareholders' Agreement to the Stock Sale (the "2005 Shareholders' Waiver"). (*See* 2005 Shareholders' Waiver, attached to the Rosemann Aff. as Ex. 9.) The 2005 Board and Shareholders' Waivers are collectively referred to as the "2005 Waivers."

5. In the Utah Supreme Court's decision in this matter, *McLaughlin v. Schenk*, 2009 UT 64, 220 P.3d 146, the Supreme Court affirmed all of this Court's prior rulings dismissing McLaughlin's claims against defendants, with one exception: the Court determined that the 2005 Waivers "were tainted by a conflict of interest because they were both executed by Greg Schenck, who clearly had an economic interest in waiving the [Transfer Restriction Provisions]." *Id.* ¶ 38.

6. Because the 2005 Waivers did not entail a "transaction" by or with Cookietree, and therefore were not subject to the Utah Revised Business Corporation Act (the "Corporation Act"), *id.* ¶ 35, the Utah Supreme Court adopted new procedures for dealing with "nontransaction-related conflict situations." *Id.* ¶ 37.

7. Specifically, the Utah Supreme Court determined that a nontransaction-related conflict situation may be resolved via any one of the three options set forth in Utah Code Ann. § 16-10a-851: (1) disinterested board members may vote to ratify the nontransaction-related conflict situation, (2) disinterested shareholders may vote to ratify the nontransaction-related conflict situation, or (3) the party with a conflict may show that the nontransaction-related conflict situation was fair. *See id.* ("The procedures provided in the conflict of interest statute most appropriately address nontransaction-related conflict situations because they do not automatically invalidate conflict of interest transactions but instead require the party with a

conflict to show the transaction was fair, or require the vote of disinterested board members or disinterested shareholders to ratify the transaction." (*citing* Utah Code Ann. § 16-10a-851 (2005))). "In adopting these procedures for nontransaction-related conflicts, [the Utah Supreme Court] recognize[d] that many aspects of corporate governance are unfair." *Id.*

8. The Utah Supreme Court then "remand[ed] for a determination of whether the [2005 Waivers] were fair within the meaning of Utah Code section 16-10a-851, which is a fact-intensive inquiry focusing on whether the [2005] [W]aivers were beneficial to the corporation and the shareholders and whether they satisfied the standard of fair dealing." *Id.* ¶ 38.

9. Following the *McLaughlin* decision, each of Cookietree's current Board and shareholders took action to ratify the 2005 Waivers, and thus cure the nontransaction-related conflict situation, in accordance with the new framework adopted in the *McLaughlin* decision.

10. On December 18, 2009, Cookietree held a meeting of its Board. At that time, the Board members were Greg Schenk, Cookietree's President; Harold Rosemann, Cookietree's Chief Financial Officer; and David Rudd, who is not (and never has been) employed by Cookietree. Prior to the meeting, David Rudd analyzed and reviewed documentation containing all of the material facts concerning the Stock Sale and the 2005 Waivers, including, but not limited to, the 2005 Waivers themselves, the 1991 Shareholders' Agreement, Cookietree's financial statements and other financial information, and the *McLaughlin* decision.

11. At the meeting, David Rudd, as the sole disinterested or "qualified" member of the Board, after full disclosure by Greg Schenk, adopted the following resolutions:

(a) ratification of the 2005 Board Waiver (the "2009 Board Ratification"); and

(b) present waiver of the Transfer Restriction Provisions to the Stock Sale.

(*See* Board Minutes (Dec. 18, 2009) at 2, attached to the Rosemann Aff. as Ex. 11.)

12. After David Rudd took the foregoing actions on behalf of Cookietree, all three Board members then voted to set the time and place of the annual shareholders' meeting and resolved that the matters of business to come before the shareholders included, among other things:

(a) the present waiver by the shareholders of the Transfer Restriction Provisions to the Stock Sale ("Proposal 1"); and

(b) ratification of the 2005 Shareholders' Waiver and the current shareholders' waiver contemplated in Proposal 1 ("Proposal 2").

(*See id.* at 2-3.)

13. On December 21, 2009, Cookietree's corporate secretary (Harold Rosemann) sent all of the shareholders of Cookietree a notice of the 2009 annual shareholders' meeting (which was to be held on January 6, 2010), an information statement concerning Proposals 1 and 2 (the "Disclosure Statement"), and a proxy. (The notice, Disclosure Statement, and proxy are attached to the Rosemann Aff. as Ex. 12.)

14. The Disclosure Statement fully disclosed all material facts concerning the 1991 Shareholders' Agreement, the Transfer Restriction Provisions, the Stock Sale, the 2005 Waivers, Greg Schenk's conflict of interest and the circumstances surrounding this litigation, and the Utah Supreme Court's *McLaughlin* decision. (*See* Disclosure Statement at 1-6.) A copy of the *McLaughlin* decision was enclosed with the Disclosure Statement.

15. At the 2009 shareholders' meeting, shareholders owning 4,113,400 shares of the common stock of Cookietree were present, in person or by proxy, out of the 4,124,650 shares issued, outstanding, and entitled to vote at the meeting. With respect to Proposal 1—to presently waive the Transfer Restriction Provisions of the 1991 Shareholders' Agreement to the Stock Sale—3,168,200 shares were voted in favor of the proposal and 400,000 shares (owned by the McLaughlins) were voted against. This 3,168,200 did not include the shares at issue in the Stock Sale, but did include Greg Schenk's remaining shares, pursuant to the waiver requirements of the 1991 Shareholders' Agreement. The Inspector of Election/Voting Judge (Harold Rosemann) also announced at the meeting that 987,000 "qualified shares" (shares excluding *all those owned by Greg Schenk*) were voted in favor of Proposal 1 and 400,000 "qualified shares" (owned by the McLaughlins) were voted against Proposal 1. It was thus resolved that the shareholders presently waived the Transfer Restriction Provisions to the Stock Sale (the "2009 Shareholders' Waiver"). (*See* Shareholder Minutes at 1, attached to the Rosemann Aff. as Ex. 13; Certificate and Report of Inspector of Election/Voting Judge ("Certificate of Voting") at 2-3, attached to the Rosemann Aff. as Ex. 14.)

16. With respect to Proposal 2—to ratify the 2005 Shareholders' Waiver and the 2009 Shareholders' Waiver—987,000 "qualified shares" (shares excluding *all those owned by Greg Schenk*) were voted in favor of Proposal 2 and 400,000 "qualified shares" (owned by the McLaughlins) were voted against Proposal 2. It was noted at the meeting that Greg Schenk did not vote on Proposal 2. It was thus resolved that the owners of a majority of the disinterested or "qualified" shares ratified (1) the 2005 Shareholders' Waiver; and (2) the 2009 Shareholders'

Waiver (the "2009 Shareholders' Ratification"). (*See* Shareholder Minutes at 4; Certificate of Voting at 7.) The 2009 Board and Shareholders' Ratifications are collectively referred to as the "2009 Ratifications."

17. On June 30, 2011, Greg Schenk and Cookietree filed the instant Motion. In the Motion, Greg Schenk and Cookietree argued that, as a result of the 2009 Ratifications, a judicial determination regarding the fairness of the 2005 Waivers is unnecessary, because the 2009 Ratifications effectively resolved the nontransaction-related conflict situation identified by the Utah Supreme Court in *McLaughlin*. Greg Schenk and Cookietree further argued that to the extent a judicial determination of fairness vis-à-vis the 2005 Waivers is required, based upon the undisputed facts, the 2005 Waivers were fair to Cookietree and its shareholders as a matter of law. As noted above, Anna Schenk and the Estate joined in the Motion.

RULING AND ORDER

At the outset, the Court considered whether it has the discretion to consider avenues other than a fairness hearing under the *McLaughlin* decision and Section 16-10a-851 of the Corporation Act—*i.e.*, a vote of disinterested directors and/or shareholders—for resolving a nontransation-related conflict situation. The Court believes that the Utah Supreme Court did not address this question in *McLaughlin*, as it could only address the dispute before it. Further, nowhere in the *McLaughlin* decision did the Utah Supreme Court prohibit Cookietree's disinterested Board member and/or disinterested shareholders from taking action anew pursuant to Section 16-10a-851 of the Corporation Act to resolve Greg Schenk's conflict of interest, nor does the *McLaughlin* decision explain why such action would be unavailable in this case. For

these reasons, the Court concludes that it has the discretion to consider other avenues for resolving the nontransation-related conflict inherent in the 2005 Waivers, namely the 2009 Ratifications.

With regard to the 2009 Ratifications, the Court concludes that there is no material question of fact concerning the circumstances surrounding the 2009 Ratifications, or the content of disclosures made to David Rudd and the shareholders in connection therewith. As such, the Court has concluded that it may decide the validity of the 2009 Ratifications—and whether they effectively resolved the nontransaction-related conflict situation at issue—at the summary judgment stage.

The Court concludes that the 2009 Ratifications complied with the framework for resolving nontransaction-related conflict situations set forth in the *McLaughlin* decision and Section 16-10a-851 of the Corporation Act, and thus completely resolved Greg Schenk's conflict of interest vis-à-vis the 2005 Waivers. Greg Schenk made required disclosure to David Rudd and the shareholders prior to the 2009 Ratifications. Further, the 2009 Board Ratification was made by a "qualified" Board (made up of one disinterested or "qualified" member, David Rudd), and the 2009 Shareholders' Ratification was likewise made by a majority of the disinterested or "qualified" shareholders of Cookietree, whether or not Greg Schenk's and Harold Rosemann's shares were counted. Importantly, however, in accordance with the *McLaughlin* decision, Greg Schenk did not vote *any* of his shares on the proposal to ratify the 2005 Shareholders' Waiver. As a matter of law, then, the Court concludes that such actions have completely resolved Greg Schenk's conflict of interest vis-à-vis the 2005 Waivers and rendered any fairness hearing (or

other further proceedings in this case) moot. Indeed, the Corporation Act provides that if directors' or shareholders' action is taken to ratify a conflicted transaction or "nontransaction" (as is the case here), the "transaction may not be enjoined, be set aside, or give rise to an award of damages or other sanctions" as a matter of law. Utah Code Ann. § 16-10a-851(2).

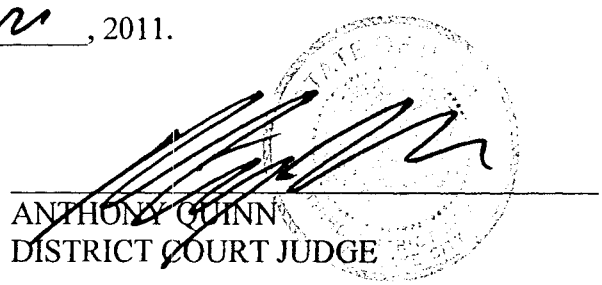
Based on the foregoing, it is hereby ORDERED, ADJUDGED, AND DECREED:

1. The Motion is hereby GRANTED insofar as the Court has concluded that the 2009 Ratifications effectively resolved Greg Schenk's conflict of interest vis-à-vis the 2005 Waivers as a matter of law (the Court has reached no conclusion regarding the fairness of the 2005 Waivers);

2. All of McLaughlin's remaining claims against defendants Greg Schenk, Cookietree, Anna Schenk, and the Estate are dismissed with prejudice and without recovery of any kind; and

3. The Court hereby directs the entry of final judgment of dismissal as to the consolidated cases.

DATED this 17 day of May, 2011.



ANTHONY QUINN
DISTRICT COURT JUDGE